United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by:
Eugene Welch

76-1242

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

WAYNE F. HENRY,

Defendant-Appellant.

On appeal from the United States District Court,
Western District of New York

BRIEF FOR APPELLEE, UNITED STATES OF AMERICA

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Statement of Issues

I. Are Sections 811, 812 and 841 of Title 21, United States Code, in violation of Article I, Section 1 of the United States Constitution?

II. Was the evidence sufficient to sustain the trial court's findings of guilt?

Statement of the Case

This case is before this Court on an appeal by Wayne F. Henry from a judgment of conviction and sentence entered in the Western District of New York on May 10, 1976. Henry was indicted along with Duane E. Baldwin and Jonathan G.

Klinkert on three counts: Count I, conspiracy to distribute a controlled substance in violation of 21 U.S.C. §846; Count II, distribution of the specifically named controlled substance, methaqualone, in violation of 21 U.S.C. §841(a)(1); and Count III, possession with intent to distribute the specifically named controlled substance, methaqualone, in violation of 21 U.S.C. §841(a)(1). The other defendants testified as government witnesses after they entered guilty pleas; Baldwin to Count II, distribution of methaqualone and Klinkert to a superseding misdemeanor Information charging him with possession of methaqualone.

Henry waived his right to a jury trial and on January 19, 1976 and January 21, 1976 was tried before the Court. At the conclusion of the two day non-jury trial the Court set a briefing schedule to run upon receipt of the transcript which the defense had requested. On April 21, 1976 the trial Judge entered his findings of fact and conclusions of law finding the defendant Henry guilty of all charges in the indictment.

On May 10, 1976 the defendant Henry was sentenced to imprisonment for one year and one day on each of the three counts, to run concurrently.

At the trial the government called two investigators assigned to the Rochester, New York office of the Drug Enforcement Administration (DEA) Task Force, a DEA chemist and the two codefendants who had already entered guilty pleas. The defense then presented the defendant Henry and an official of the Pennwalt Pharmaceutical Corporation. Their testimony and the exhibits in evidence clearly establish that the defendants Baldwin, Klinkert and Henry were all employed during the relevant time periods at Pennwalt, a pharmaceutical company in Rochester, New York (Record, p. 62, 107, 159). (All references are to original transcript pages because the appendix was not yet prepared at the time this brief was written.)

Baldwin had previously stolen a brown resinous substance known as phentermine from Pennwalt and sold it to one Carmen Martucio (p. 111, 126). Baldwin then agreed with Klinkert and Henry to steal more of the brown resinous substance for resale purposes (p. 116, 161, 162, 192, 193). Henry and Baldwin scooped up a quantity of this substance and stole it from Pennwalt (p. 112, 113). Henry then stored it at his residence (p. 168, 195). Henry then gave a sample of the substance to Baldwin (p. 129, 172, 173), so that Baldwin could give this sample to a prospective buyer. Shortly after this sample was given to the buyer a sale of the entire quantity was set up at Klinkert's home.

Henry, who had previously discussed the price of the resale with Baldwin (p. 115, 121, 136), brought the stolen substance to Klinkert's where he and the undercover investigator negotiated the price (p. 13, 122, 184). Contrary to an assertion in Henry's brief (p. 4) that Baldwin and Klinkert had brought other bags of substance to Klinkert's on the day of the sale, there is no evidence that anyone other than Henry brought any substances to Klinkert's on the day of the sale (p. 78, 97, 110, 141, 177). What was sold by Henry to the investigator was the substance that Henry brought to the scene. When the sale was negotiated Henry then went with the agent to the agent's car to get the money in payment for this substance (p. 17-19, 186).

When the DEA chemist analyzed the substance that Henry had sold he discovered it was the controlled substance methaqualone and not the controlled substance phentermine as the evidence indicates all the parties to the sale thought it was.

The evidence established that Henry conspired to sell a controlled substance and did sell a controlled substance although under the mistaken idea that it was phentermine not methaqualone.

His defense, however, was that he did not know it was a controlled substance but rather felt that it was an inert resin

used in the manufacture of controlled substances. The trial court found this defense was incredible from all the circumstances surrounding Henry's theft, storage, negotiations and sale of this substance. Those circumstances are set out in more detail in the government's argument on the sufficiency of the evidence in Point II below.

POINT I

Sections 811, 812 and 841 of Title 21, United States Code, were enacted in accordance with Article I, Section 1 of the United States Constitution.

Appellant argues that the classification of methaqualone as a Schedule II substance under the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1242, 21 U.S.C. §§811, 812, 841, comprised an unconstitutional delegation of legislative authority by the Congress to an agency of the Executive Branch. He complains that he has defended against possession of a controlled substance that *Congress* never classified as a Schedule II substance — that the Department of Justice and the Attorney General made that classification and exercised that judgment in violation of Article I, Section 1 of the United States Constitution. This argument is patently without merit.

> The mandate of the Constitution that all legislative powers granted 'shall be vested' in Congress has never been thought to preclude Congress from resorting to the aid of administrative officers or boards as fact-finding agencies whose findings, made in conformity to previously adopted legislative standards or definitions of Congressional policy, have been made prerequisite to the operation of its statutory command. The adoption of the declared policy by Congress and its definition of the circumstances in which its command is to be effective constitute the performance in the Constitutional sense, of the legislative function. *Opp Cotton Mills* v. *Administration*, 312 U.S. 126, 144 (1941).

Congress clearly outlined its policy of control of dangerous drugs both through preventative and corrective measures:

> The legislation is designed to deal in a comprehensive fashion with the growing menace of drug abuse in the United States (1) through providing authority for increased efforts in drug abuse prevention and rehabilitation of users, (2) through providing more effective means of law enforcement aspects of drug abuse correction and control, and (3) by providing for an overall balanced scheme of criminal penalties for offenses involving drugs. H.R. Rep. No. 91-1444, 91st Cong., 2d. Sess. (1970); 3 U.S. Code Congressional and Administrative News, p. 4567 (1970).

Having declared its fundamental policy, the Congress then listed the drugs initially subject to control under the legislation, and established a procedure for future determinations as to drugs to be subject to the controls of the Act, a procedure which was to provide for continuing changes and developments in the fields of pharmacology and chemistry. Sections 811, 812 of Title 21 provide a set of legislatively mandated standards to which the Attorney General must conform in order for a drug to be added to or transferred between schedules. Specifically, the statute requires that the Attorney General obtain from the Secretary of Health, Education and Welfare "a scientific and medical evaluation, and his recommendation as to whether such drug should be so controlled". (21 U.S.C. §811(b)). The legislature further dictates that both the Attorney General and the Secretary, Health, Education and Welfare, shall consider a broad range of enumerated variables in their evaluation and determination, including the potential for abuse, scientific evidence of pharmacological effect, the state of current scientific knowledge, the possibilities of psychic and physiological dependency, and public risk involved. 21 U.S.C. §811(c).

A drug may not be placed on Schedule II unless both the Attorney General and Secretary of Health, Education and Welfare find that:

(A) The drug or substance has a high potential for abuse.

(B) The drug or substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions.

(C) The abuse of the drug or substance may lead to severe psychological or physical dependency. 21 U.S.C. §812(b)(2).

The statute not only firmly enunciates the legislative policy for the control of dangerous substances, it also clearly defines a procedure and standards to be followed to "fill out the details" (citing Justice John Marshall in *Wayman* v. *Southard*, 10 Wheat 1, 42 (1825)) in determining what substance shall be included under the legislation.

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the Congressional policy to infinitely variable conditions constitute the essence of the program. 'If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of power.' *Hampton Co.* v. *United States*, 276 U.S. 394, 409. *Lichter* v. *United States*, 334 U.S. 742, 785 (1948).

In Title 21 of the United States Code, Congress has merely implemented a highly efficient mode of designating, through the most accurate and reliable channels of medical and scientific study available to it, what substances pose a sufficient threat to the general welfare so as to warrant coverage by the legislative policy. Congress has realistically surveyed the enormity of the pharmacological field, and provided for it accordingly. Justice Harlan observed in *Field* v. *Clark:*

> The legislature cannot delegate its power to make a law, but it can make law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny that would stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside the Halls of Legislation. 143 U.S. 649, 694 (1892).

Appellant puts forth the argument that even if the procedure established by 21 U.S.C. §§811, 812 is sufficient to compel *civil* compliance with the regulation by those within the legitimate chain of distribution, it is not sufficient to create a crime as described in Section 841(a)(1), nor to make the defendant liable for the criminal penalties imposed by Section 841(b). This attempted distinction also proves to be of no merit. "... Congress unquestionably may validly provide a criminal sanction for violation of rules or regulations which it has empowered the President or an administrative agency to enact, ..." *United States* v. *Grimaud*, 220 U.S. 506 (1911), in *United States* v. *Vargas*, 380 F.Supp. 1162, 1167 (E.D.N.Y. 1974). The fixation of the penalty for the violation of reasonable regulations is made by the statute itself, and therefore the Congress, not the Department of Justice, Attorney General, or Secretary of Health, Education, and Welfare. The Congress itself correctly exercised the legislative power of declaring penalties or fixing punishments. *United States* v. *Grimaud*, supra, 523.

Two further points of objection are made by appellant:

> (1) The procedure does not give due notice of the classification — (nor were the laws' own publication standards met), and
>
> (2) The delegation of power to create the crime went to that agency charged with the responsibility to prosecute the crime. Appellant's Brief, p. 9.

21 U.S.C. §811(a) directs that "Rules of the Attorney General under this subsection shall be made on the record after opportunity for a hearing pursuant to the rule-making procedures prescribed by subchapter II of Chapter 5 of Title 5." In relevant part, that subchapter provides that an agency "shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law . . ." (5 U.S.C. §552(a)(1)(D)). Pursuant to this section and other pertinent sections of the Chapter (5 U.S.C. §§553, 556, 557) notice was published in the Federal Register on April 11, 1973 (dated April 6, 1973) 38 Fed. Reg. 9170, as amended on April 17, 1973, and published on April 23, 1973, 38 Fed. Reg. 10010, proposing placement of methaqualone and its salts in Schedule II. All interested parties were given thirty days after publication to object, comment, or request hearings. In compliance with a request by a pharmaceutical manufacturer, a hearing was held before an Administrative Law Judge on July 17 and 18 and August 1 and 2, 1973. The recommended decision, its review and adoption without modification by the Acting Administrator, Drug Enforcement Administration, and an order amending §§130.02 and 1308.12 of Title 21 of the Code of Federal Regulations to include methaqualone under Schedule II, were duly reported in the Federal Register on October 4, 1973, 38 Fed. Reg. 27517. This publication was also in full compliance with appropriate sections of the Federal Register Act, requiring publication in the Federal Register of documents having "general applicability and legal effects. * * * For the purposes of thi chapter every document or order which prescribes a penalty has general applicability and legal effect." 44 U.S.C. §1505(d). It is well settled that when regulations are published in the Federal Register they give legal notice of their contents to all who may be affected thereby. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380 (1947); Federal Register Act of 1935, 49 Stat. 500, 502, 44 U.S.C. 1507.

The argument that the republication standards of 21 U.S.C. §812(2) were never met is also put forth by defendant Henry. That section calls for update and republication on a semi-annual basis during the two year period beginning one year after the date of enactment (Oct. 27, 1970), and on an annual basis thereafter. On May 12, 1972, January 8, 1973, March 30, 1973 and June 20, 1974 (in 37 Fed. Reg. 9545, 38 Fed. Reg. 953, 38 Fed. Reg. 8254, and 39 Fed. Reg. 22140, respectively), the Government republished the schedules as required by Section 812 of the Act. Since the addition of methaqualone to Schedule II was effected October 4, 1973 (38 Fed. Reg. 27517), and since defendant was indicted on June 27, 1974 for acts committed on May 30, 1974, the requirements of §812 as relevant to methaqualone were adequately met by the June 20, 1974 republication. Future or prior laxities in compliance were of absolutely no effect on the addition of methaqualone to the Schedule on October 4, 1973. The obligation to republish in accordance with §812(a) had not yet ripened at the time of Henry's alleged offense, see *United States* v. *Nocar*, 497 F.2d 719 (7th Cir. 1974); *cert. denied*, 419 U.S. 1038 (1974). Notice of the addition of the drug was correctly given by the Federal Register on October 4, 1973. 21 U.S.C. §812(a) clearly indicates its purpose is one of keeping current or updated schedules available through republication, not one of notice.

The further contention that the delegation of power to create the crime went to that same agency vested with the responsibility of prosecuting the crime, carries no weight, since it was the Congress, not the Attorney General or the Secretary of Health, Education and Welfare, that legislated both the policy and penalty involved. Those two agencies merely implemented the societal policy of controlling dangerous drugs determined by Congress, in accordance with a clearly established procedure and set of standards also determined by the legislature.

POINT II

The evidence was sufficient to sustain the Court's findings.

In his second Point the appellant Henry argues that the government failed to prove that he was guilty beyond a reasonable doubt. His argument is based upon his own self-serving testimony and certain attempts by the defense to confuse the facts in an effort to impeach the weight and credibility of the government's evidence. The trier of fact, however, has considered these attempts and has ruled against this defendant, finding him guilty. The arguments put forth by the defendant in this Point are more appropriate for the trier of fact when the defense is attempting to convince the fact finder that there is some reasonable doubt. They simply go to the weight of the evidence but ignore the test that this Court of Appeals has set for itself in reviewing a criminal conviction.

> "[T]he test here is whether upon the evidence, giving full play to the right of the trial judge to determine credibility, weigh the evidence, and draw justifiable inferences of fact, 'a reasonable mind might fairly conclude guilt beyond a reasonable doubt' ". *United States* v. *Freeman*, 498 F.2d 569, 571 (2d. Cir. 1974).

The government respectfully submits that considering the evidence in the view most favorable to the government as this Court in *Freeman, supra*, 498 F.2d at 571, said it must, (*See also Glasser* v. *United States*, 315 U.S. 60, *reh. denied*, 315 U.S. 827 (1942)), the evidence is sufficient for a reasonable mind to fairly conclude guilt beyond a reasonable doubt.

Defendant was charged with three counts of the indictment:

(1) Conspiracy to dispense and distribute a controlled substance, in violation of 21 U.S.C. §846.

(2) Knowing, intentional and unlawful dispensation of a substance containing methaqualone, in violation of 21 U.S.C. §841(a)(1).

(3) Knowing, intentional and unlawful possession with intent to distribute and dispense, of a substance containing methaqualone, in violation of 21 U.S.C. §841(a)(1).

Henry took the stand and admitted to participating in the theft of a substance from Pennwalt (the pharmaceutical corporation where defendant Henry was employed), and also admitted to participation in the ultimate distribution of that substance on May 30, 1974, which resulted in the indictment. As his defense, Henry claimed that he did not know this substance contained a controlled substance, but rather thought it was an inert substance or raw material from which controlled substances can be made.

The law is clear that the defendant need not know the exact nature of the controlled substance involved, but only that it is a controlled substance. *United States* v. *Olivarez-Vega*, 495 F.2d 827, 830 fn. 10 (2nd Cir. 1974); *United States* v. *Balint*, 258 U.S. 250 (1922); *United States* v. *Davis*, 501 F.2d 1344, 1346 (9th Cir. 1974). The government met its burden of proof if the Court was satisfied that the defendant knew it was a controlled substance. In this case there is sufficient evidence to establish that defendants knew they possessed a controlled substance of some kind, even though there was evidence tending to establish that the defendants, as well as the narcotics officers, were confused at first as to whether they had a controlled substance known as phentermine or a controlled substance known as methaqualone. The two substances are indistinguishable without chemical analysis. (Transcript of Tsougros' testimony — p. 9).

Henry himself testified that in their initial conversation, after February, 1974, pertaining to the removal of substances from Pennwalt premises, Baldwin told him that "if we could get some phentermine, we could make a lot of money off it." (R. p. 160).

Henry also testified that Baldwin told him that he had seen a control lab specialist mark a sample from the storage drum in question as phentermine. (R. p. 170).

Duane Baldwin testified that he usually referred to the substance as phentermine when conversing with Henry, and recalled that Henry did likewise. (R. p. 117). Baldwin recalled that both he and Henry sometimes called it "speed." (R. p. 118). Baldwin specifically testified that he believed the substance was phentermine resin (R. p. 119).

The facts introduced into evidence are more than sufficient for the trier of fact to reasonably draw the inference that appellant was aware that the substance was a controlled one. Henry testified that Baldwin offered him $1500 to participate in the theft of the substance (R. p. 162), and that he believed Baldwin took it with the intentions of selling it (R. p. 193). Baldwin testified that approximately two weeks before the attempted sale on May 30, 1974, he and Henry met in Durand Eastman Park, and agreed that "we should try and get as much as possible, which is about eight thousand dollars." (R. p. 121). It was also Henry's testimony that he participated in the price negotiations with Agent Martin, and that it was he who suggested the forty-five hundred dollar figure agreed upon (R. p. 184). The fact that Baldwin and Henry felt they could command $8,000, $5,500, or even $4,500 for this substance clearly demonstrated that they believed the substance to be a controlled one. The Court could find from the suspiciously high price that the defendant knew it to be a controlled substance. *United States* v. *Davis*, 328 F.2d 864, 866 (2nd. Cir. 1964).

Both Baldwin and Henry admitted in their testimony (R. pp. 129, 172-74) that Henry had brought a sample of the stolen material to Baldwin prior to the May 30, 1974 sale. Both testified this was done so that Baldwin could give the sample to the prospective buyer. After delivery of the sample from Henry to Baldwin, and from Baldwin to the buyer, approximately one

week prior to May 30, the sale of the entire quantity of the substance was arranged, since no complaints had been made as to its quality. Again, the inference was clearly reasonable and factually substantiated that Henry possessed the knowledge that the substance they were selling on May 30, 1974 was in fact a controlled substance, not an inert resin.

The fact that this sample of the substance had been given to the prospective buyer is uncontroverted, and by itself conclusively establishes that Henry knew he was dealing with a controlled substance. Had the substance been an inert resin Henry could only conclude the prospective buyer certainly would have detected that fact prior to the sale and refused to go through with it. Defendant would surely not pass out a sample of a substance to a buyer he later hoped to dupe or deceive with that same substance. The inference here was further strengthened by Henry's testimony that Baldwin had told him prior to the actual theft from Pennwalt that Baldwin had sold phentermine taken from Pennwalt in the past, and that if they could steal more of the same, they could make a lot of money selling it again (R. p. 160). It was thus clear that Baldwin and Henry stole the material for purposes of resale as a controlled substance.

Also of significance in drawing the inference that Henry knew that what he possessed was a controlled substance, was his testimony that he stored it in a *locked* footlocker in a locked closet in his home (R. p. 168, 195). This was entirely consistent with a belief that the substance was in fact a valuable but dangerous controlled substance. While the argument could be put forth that he kept it under lock and key to prevent its discovery so that he could not be accused of stealing from Pennwalt, testimony established that there was nothing in or about the substance or its containers that would identify it with Pennwalt Laboratories. In addition, Baldwin alone was under suspicion for the theft from Pennwalt — Henry was not implicated. The only fair inference to be drawn from the fact that

defendant Henry stored the substance under lock and key, therefore, is that he knew he was in possession of a dangerous, controlled substance.

That Baldwin, Henry and Klinkert used their own true names, rather than assumed ones, during the transaction (which took place at Klinkert's home) was testified to by Henry and corroborated by Baldwin (R. pp. 109, 195). This clearly manifested Henry's knowledge that what he was selling was a controlled substance, rather than an inert resin. The fact that they used a clearly identifiable place where they could easily be relocated by a disgruntled buyer, and the fact that they used their real names, were just two more circumstances from which the Court could reasonably conclude that Henry believed the substance was in fact a controlled one, which would satisfy the buyer.

According to his own testimony, Henry based his assumptions that the substance was merely an inert resin on Klinkert's opinion and on the location of the material in the raw materials warehouse (r. p. 197). Although any of the facts previously discussed were sufficient to put appellant on notice as to the actual nature of the substance, he chose to maintain a studied ignorance as to its exact nature. Despite Baldwin's insistence that the substance was phentermine, and had been so marked by a quality control specialist at Pennwalt, Henry made no effort to verify the actual nature of the material. He similarly failed to verify its nature even though Baldwin had told him that he had previously sold to a third party, as "speed" or phentermine, a substance looking exactly like the substance herein. This studied ignorance is also evidenced by appellant's own testimony that he did not want to know why Baldwin wanted the substance wrapped separately. (R. p. 175). Under decisions of both the Supreme Court and the Second Circuit, "studied ignorance" of a fact may "constitute an awareness of so high a probability of the existence of the fact as to justify the inference of knowledge

of it." *United States* v. *Joly*, 493 F.2d 672, 675, (2nd Cir. 1974), citing *Turner* v. *United States*, 396 U.S. 398, 416 n.29 (1970), *Leary* v. *United States*, 395 U.S. 6, 46 n.93 (1969); *United States* v. *Jacobs*, 475 F.2d 270, 287-288 (2nd Cir. 1973), *cert. denied sub nom. Thaler* v. *United States*, 414 U.S. 821; *United States* v. *Squires*, 440 F.2d 859, 863-64 (2nd Cir. 1971). Also, *United States* v. *Dozier*, 522 F.2d 224 (2nd Cir. 1975); *United States* v. *Olivarez-Vega*, 495 F.2d 827 (2nd Cir. 1974). The evidence established that Henry had every reason to believe that the substance was controlled, yet made no effort to verify its actual nature.

The inference of knowledge that the subject of a transaction is a contolled substance "does not automatically disappear because other evidence arguably points the other way." *United States* v. *Dozier*, *supra*, at 227; quoting from *United States* v. *Joly*, *supra*, at 676. While Henry, in his testimony on his own behalf, claims to have believed the substance to be an inert resin, this self-serving statement was outweighed by the testimony of codefendant Duane Baldwin, and the circumstance of the theft and sale thereafter. Circumstantial evidence, to be sufficient to convict, need not exclude every reasonable hypothesis of innocence to be drawn from the evidence. *Holland* v. *United States*, 348 U.S. 121, 138-40(1954); *United States* v. *Warren*, 453 F.2d 738, 745 (2nd Cir.), *cert. denied*, 406 U.S. 944 (1972); *United States* v. *Tutino*, 269 F.2d 488, 490 (2nd Cir. 1959).

Defendant-appellant Henry admitted to participating in the theft of a substance from Pennwalt sometime in February of 1974, and to storing that substance under lock and key at his place of residence until May 30, 9174. Henry also admitted that he delivered a sample of that substance to Baldwin to give to the prospective buyer, and that he participated in the ultimate distribution of that substance on May 30, 1974, when he brought it to the residence of Jonathan Klinkert. Testimony of

Michael Tsougros of the Department of Justice, Drug Enforcement Agency (Tsougros/Head record, pp. 5-9), Investigator Ronald Martin of the DEA Task Force, (R. pp. 19-22), and Donald Migliorati, also of the DEA Task Force, (R. pp. 56-57), established that that substance did in fact contain methaqualone, a controlled substance under Schedule 2 of U.S.C. §§811, 812. Circumstances previously discussed were sufficient to establish beyond a reasonable doubt, that Henry knew the substance he possessed and was conspiring to distribute was in fact a controlled substance.

CONCLUSION

For the foregoing reasons, the Government-Appellee respectfully submits that the judgment of conviction should be affirmed.

Respectfully submitted,

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Russell D. Hay/Board Chairman

The Daily Record

August 20, 1976

Re: UNITED STATES OF AMERICA V WAYNE F. HENRY (76-1242)

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

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Eugene Welch, Asst. U.S. Attorney for Richard J. Arcara, U.S. Attorney

Attorney(s) for
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